IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5798 of 2002

and

CRIMINAL MISC.APPLICATION No 5799 of 2002

with

CRIMINAL MISC.APPLICATION No 7813 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

YUSUF ISMAIL VOHRA

Versus

U H PATEL INTELLIGENCE OFFICER

Appearance:

1. Criminal Misc.Application No. 5798 of 2002

MR BM GUPTA for Petitioner No. 1

MR ANANT S DAVE for Respondent No. 1

MR MA BUKHARI APP for Respondent No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 20/09/2002

C.A.V. JUDGEMENT

1. By Criminal Misc. Application Nos.5798 and 5799 of 2002, the petitioners have sought to challenge the identical orders dated 3.7.2002 below Exhs.39 and 50 in Sessions Case No.220 of 2000 and No.143 of 2000 respectively, whereunder, the applications of the petitioners to recall the order framing charge and to follow the provisions of Section 244 of the Code of Criminal Procedure ('the Cr.P.C.' for short) are rejected by the learned Special Judge, Court No.10, Ahmedabad.

The issue which was required to be decided by that Court was whether the Special Court under the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) was the court of original jurisdiction required to record the evidence under Chapter XIX of the Cr.P.C. at the pre-charge stage insofar as the case was alleged to have been instituted otherwise than on a police report.

2. Since these petitions were argued on a solitary legal point and the facts are not required to be recounted, suffice it to record that the complaints against the accused, including the petitioners, were filed by the Intelligence Officer, Narcotic Control Bureau, Zonal unit, Ahmedabad, both the Sessions Cases arose out of one C.R. No.NCB/6/99 and no notification constituting Special Courts under Section 36 of the NDPS Act having been published in the State, the City Civil and Sessions Court had taken cognizance of the complaints and, after giving opportunity to both the sides, had framed on 14.9.2000 charges against the accused.

3. The Special Court, after an elaborate discussion on the contentions raised and the judgments cited on either side, held that that Court was required to function as a Special Court, that no separate committal proceedings were necessary, that cognizance could be taken by that Court without fulfilling any other procedural requirement and that the procedure to be followed for the trial was as prescribed for the trial before the Court of Session under Chapter XVIII of the

Cr.P.C.

4. The learned counsel for the petitioners Mr.B.M.Gupta sought to raise the same issues with a slight shift in emphasis on the part of the procedure required to be followed by the trial Court and, in substance, submitted that the cases in hand were required to be tried as warrant cases in view of the punishment prescribed for the alleged offence. Elaborating the arguments, he submitted that, by virtue of the provisions of Section 190, cognizance of an offence upon receiving the complaint can be taken by a Magistrate and, in absence of commitment of the case to a Court of Session, and the Special Court being distinct and different from a Court of Session, the procedure that can be followed by the trial Court is only the one prescribed for the trial of warrant cases by Magistrates. He further submitted that by virtue of the provisions of Section 36-A of the NDPS Act, particularly sub-section (1) (d), taking of cognizance without the accused being committed to it for

trial was permitted. And, by virtue of the provisions of Section 36-C of the NDPS Act, the provisions of the Cr.P.C. are expressly made applicable to the proceedings before a Special Court. Therefore, according to the submission, the procedure prescribed for the trial of warrant cases had to be followed. It was also sought to be argued that the view that the procedure prescribed in Chapter XVIII was required to be followed was incorrect insofar as at the very first stage of opening of the prosecution case, commitment of the case under Section 209 is contemplated in Section 226 of the Cr.P.C. and that is non-extant when a Special Court takes cognizance under the NDPS Act.

5. A clear answer to the arguments of the petitioners can be found in the explicit provisions of Sections 36-C and 36-D of the NDPS Act which read as under:

> "S.36-C. Application of the Code to proceedings before a Special Court.-
> Save as otherwise provided in this Act, the provision of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a public prosecutor."

"S.36-D. Transitional provisions.-

(1) Any offence committed under this Act on or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (2 of 1989) which is triable by a Special Court shall, until a Special Court is constituted under Sec.36, notwithstanding anything contained in the Code of Criminal Procedure, 1973 be tried by a Court of Session.

(2) xxx xxx xxx"

Apparently, as an arrangement for the transitional period, a Court of Session is to function as a Special Court under Section 36-D. And, the provisions of the Cr.P.C. are to apply to the proceedings before a Special Court and such applicable provisions in respect of the procedure are the provisions applicable to a Court of Session by virtue of the provisions of Section 36-C. It is indicated by the opening clause of Section 36-C itself that if a departure from the procedure prescribed for the Court of Session were to be made, it had to have been otherwise clearly provided in the Act. In absence of any such provision indicating a departure from the procedure, the Special Court, be it a Court of Session under the transitional provision or a Special Court constituted under Section 36, shall have to follow the procedure

prescribed in Chapter XVIII of the Cr.P.C. in the proceeding before such Court. The provisions of Section 193 of the Cr.P.C. cannot come in the way of such interpretation and application of the express provisions of the NDPS Act because of the express provision made in Section 36-A (1) (d) of the Act. That provision stands expressly excluded by the aforesaid opening clause of Section 36-C. This interpretation is further buttressed by the express provisions of Sections 4 and 5 of the Cr.P.C., which read as under:

"S.4 Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and

otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

"S.5 Saving.-
Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

6. The learned counsel for the petitioners relied upon the following judgments which, in the facts and in the context of legal provisions discussed hereinabove, are found not to be applicable or supporting the plea of the petitioners:

(i) Banka Das v. State of Orissa [1993 Cri.L.J.442] was cited in support, wherein, it is held that Section 36-A of the NDPS Act clearly indicates that it was the Special Court which had to exercise the powers of a magistrate in relation to an accused person suspected of commission of an offence under the NDPS Act. The only power of magistrate before whom such an accused was produced is as provided in S.36-A (1) (b). The only harmonious construction of S.36-A and S.36-D is that until a special Court is constituted under S.36, the Court of Session will exercise the powers of a Special Court.

(ii) The judgment in Sardarsingh Nagsingh Rajput v. State of Gujarat [1993 Cri.L.J. 3474] was relied upon to submit that since the offences under the NDPS Act are to be tried by the Special Courts which during the transitional period includes the Session Courts also, the chargesheet of the cases under the said Act are required to be submitted before the Special Court or the Session Court, as the case may be.

(iii) A.R.Antulay v. Ramdas Sriniwas Nayak [AIR 1984 SC 718], State of Tamil Nadu v. Krishnaswami Naidu [AIR 1979 SC 1255], Suryakant Ramdas More v. State of Maharashtra [1989 Cri.L.J. 2422],

Harshad S. Mehta v. State of Maharashtra [2001 (6) Supreme 694, and State of Tripura v. Bhupen Dutta Bhowmik [2001 (5) Supreme 233]: The learned counsel cited the above cases in support of his submission that Court of Special Judge is a Court of original criminal jurisdiction and shall have all powers except those specifically excluded.

(iv) The judgments in State of Gujarat v. Rashish Ahmed Rafik [1991 (1) G.L.R. 548], State of Punjab v. Balbir Singh [AIR 1994 SC 1872], State of Punjab v. Baldev Singh [2000 (1) G.L.H. 1], and Supreme Court Legal Aid Committee representing Undertrial Prisoners v. Union of India [JT 1994 (6) SC 544] were cited by the

learned counsel to submit that the legislature has specifically provided in Sec.36-C of the NDPS Act that save as otherwise provided in the Act, the provisions of the Cr.P.C. shall apply to the proceedings before a Special Court and wherever the legislature wanted to exclude the provisions of the Cr.P.C., it has specifically provided for it.

(v) Pravinkumar Manilal Mehta v. Jyotindra M. Bhatt [1989 (1) G.L.R. 523] was also cited in support the submission that in a private complaint for warrant triable offences, pre-charge evidence under Section 244 of the Cr.P.C. is necessary.

(vi) The judgment of the Apex Court in USMANBHAI DAWOODBHAI MEMON v. STATE OF GUJARAT [AIR 1988 SC 922] was relied upon to submit that all offences under the Indian Penal Code, 1860 shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained therein, i.e. in accordance with the procedure prescribed under the Code.

7. In the result, Criminal Misc. Applications No.5798 and 5799 of 2000 are dismissed at the threshold.

8. The third Criminal Misc. Application No.7813 of 2000, arising from the same proceeding in the trial Court, was filed earlier with a prayer to quash the order

passed below Exh.14 in Sessions Case No.143 of 2000 when the learned Additional City Sessions Judge refused to halt the proceedings in absence of an injunction. That

grievance and the petition were not seriously pressed in light of the view as above being taken by this Court in the main matters. Therefore, that petition is also rejected with no order as to costs. Notice is discharged. Interim relief, if any is operating, shall stand vacated.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)